FOR THE JUNIORS.

THE MARSHALLING PROBLEM AGAIN.—A learned subscriber has questioned, without citation of authority, our solution of the problem in marshalling (2 Va. L. Reg. 625). In making an investigation for the purpose of satisfying him of his error, we have been driven to confess our own. We based our solution on English authorities, without observing that in America the great weight of authority was the other way.

The leading case in England on the subject is *Barnes v. Racster*, 1 Y. & C. C. C. 401. There, A mortgaged Blackacre to B; later he mortgaged Blackacre to C; still later, Blackacre and Whiteacre to B; and, later still, both to D. Each of the subsequent incumbrancers took with notice. The situation was therefore thus:

1. Blackacre mortgaged to B.
2. Blackacre mortgaged to C.
3. Blackacre and Whiteacre mortgaged to B.
4. Blackacre and Whiteacre to D.

B having exhausted Blackacre in payment of his claims, C asked to be let in upon Whiteacre. But Sir J. L. Knight Bruce, Vice-Chancellor, declined to marshal as against D.

The same principle is thus stated in Adams' Equity: "The equity [of marshalling] is apparently not binding on the debtor's alienee for value, notwithstanding he may have taken with notice of the facts, unless his interest were acquired after the institution of a suit. For although the ordinary rule is, that an alienee with notice is bound by all the equities which bound his alienor, yet there is a distinction in regard to this particular equity; because the omission of the creditor to take an express collateral charge" [*i. e.*, in addition to his mortgage of an already mortgaged subject] "raises a presumption that he meant to leave the equity defeasible, and to continue the owner's power of dealing with the second estate for value, unfettered by his claim" (p. 273). In the case stated by us, the last lienor claimed not as an alienee but as a judgment creditor, yet we apprehend that the equities of an alienee with notice are not greater than those of a judgment creditor—the claim of both being alike subject to all prior equities. See, to the same effect, notes to *Aldrich v. Cooper*, 2 Leading Cas. Eq. (marg. p.) 107, and cases cited; 14 Am. & Eng. Enc. Law, 687. And the following American cases: *Green v. Ramage* (Ohio), 51 Am. Dec. 458; *Gilliam v. McCormick*, 85 Tenn. 597; *Marr v. Lewis*, (Ark.), 25 Am. Rep. 553.

While some of the American courts have adopted this view, the principle has not met with general favor here. The prevailing doctrine with us is that since the equity of marshalling, as between lienors No. 1 and 2, exists against the debtor himself, so must it exist as against all who claim under him, with notice. Hence, in the problem stated, since C might have insisted upon marshalling and have been let in upon Blackacre had not the fortuitous circumstance of D's subsequently obtaining judgment intervened, so must he still have that right, since D must stand in his judgment debtor's shoes, with no other rights than the latter himself possesses. This view is maintained in *Delaware etc. Co.'s Appeal*, 2

Wright (Pa.) 512; *Hastings' Case*, 10 Watts (Pa.) 303; *N. Y. Life etc. Co. v. Vanderbilt* (N. Y.) 12 Abb. Pr. 458; *Herbert v. M. & L. Ass'n*, 2 C. E. Greene (N. J.) 495; *Lyman v. Lyman* (Vt.) 76 Am. Dec. 151; *Clowes v. Dickenson*, 5 Johns. Ch. 235; and in other American cases cited in American notes to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 266–269, and in 14 Am. & Eng. Enc. Law, 686–7.

For the Virginia lawyer, further discussion is unnecessary, as the question is settled by repeated decisions of our own courts. In *Conrad v. Harrison*, 3 Leigh, 532, X mortgaged certain lands to Brock; subsequently he executed a mortgage on part of them only, to Harrison; later the whole was mortgaged to Conrad. In a contest between Harrison and Conrad, the last two incumbrancers, it was held that Harrison was entitled to be let in upon that portion not covered by his mortgage, though the effect should be to deprive the last lienor, Conrad, of all security for his debt. The judges delivered opinions, *seriatim*, the opinion of Tucker, P., being a complete vindication of the principle that the right of a second incumbrancer to the equity of marshalling cannot be affected by a subsequent lien or right acquired by a creditor or purchaser, with notice. The court had virtually held otherwise in *Beverly v. Brooke*, 2 Leigh, 425, which case, on this point, the later case overrules *arguendo*—the demolition being completed by the subsequent case of *McClung v. Beirne*, 10 Leigh, 394, and the *Conrad Case* affirmed. See also: *Henkle v. Allstadt*, 4 Gratt. 284; *Alley v. Rogers*, 19 Gratt. 366, 389; *Jones v. Phelan*, 20 Gratt. 229, 241; *Whitten v. Saunders*, 75 Va. 563, 569; *Miller v. Holland*, 84 Va. 652.

After all, the real principle involved, as shown in most of the Virginia cases just cited, is the familiar one that where an estate is subject to a paramount charge, and there are subsequent alienations of parts of the estate, either absolutely or by way of mortgage, the property must contribute to the charge in the inverse order of alienation—a doctrine which is fixed by statute in Virginia where the paramount charge is a judgment (Code 1887, sec. 3575) and equally fixed as to other incumbrances by the decisions of our Court of Appeals, above cited.

We are fully satisfied that the American doctrine stated is sound in principle, and we hereby forever forswear the contrary. Equitable considerations suggest that the author of the heretical view heretofore expressed in these pages exonerate his associates from the burden of his error. This he does by signing this retraction.

W. M. L.

LARCENY OF SOVEREIGN RECEIVED BY MISTAKE FOR A SHILLING.—In *Queen v. Ashwell*, 16 Q. B. D. 190, the facts were that Ashwell asked Keogh for the loan of a shilling. Keogh gave Ashwell a sovereign, believing it to be a shilling, and Ashwell took the coin under the same belief. Sometime afterwards Ashwell discovered that the coin was a sovereign; and then and there fraudulently appropriated it to his own use. Ashwell was tried and found guilty of larceny, and on appeal the conviction was sustained by an equal division of the judges.

Whether Ashwell was guilty of larceny at common law has been the subject of much dispute, and the question is not yet settled. In *Queen v. Ashwell, supra*, all the judges (as is explained in the later case of *Queen v. Flowers*, 16 Q. B. D. 643), concurred in holding that it is an established principle that "the innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny." [See *Hunt v. Com.*, 13 Gratt. 757; *Tanner v. Com.*, 14 Id. 635.]